Supreme Court, U.S.
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No. 06-699

In The

Supreme Court of the United States

DAISY ESTELLE COBB,
widow of OLIVER RAY GIBBS,

Petitioner,

v.

CENTRAL STATES, SOUTHEAST AND
SOUTHWEST AREAS PENSION FUND,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Where the United States Court of Appeals for the Fifth Circuit had a duty to review *de novo* the entire record from the United States District Court for the Eastern District of Louisiana and where the United States Court of Appeals for the Fifth Circuit held that petitioner, "Cobb (Mrs. Gibbs) has *not* proved that Gibbs (Mr. Gibbs) made a knowing misrepresentation, namely, that he knew that his estranged wife was still alive.", and, the record *has* clearly proved that Gibbs *did* know that his wife was alive when he fraudulently stated that she was deceased, whether the United States Court of Appeals for the Fifth Circuit failed to properly review de novo the entire record from the United States District Court for the Eastern District of Louisiana.

2. Whether The United States District Court for the Eastern District of Louisiana committed error in refusing to grant plaintiff's Motion For Summary Judgment and the United States Court of Appeals for the Fifth Circuit committed error in vacating the judgment of the United States District Court for the Eastern District of Louisiana and remanding with instruction to dismiss for want of subject matter jurisdiction.

3. Whether the surviving spouse of a participant, in a retirement pension plan governed by ERISA, who would normally have standing, but for the disputed alleged *de facto* election by the participant, continues to have standing, to challenge the alleged *de facto* election of the participant, as a potential beneficiary within the meaning of 29 U.S.C. § 1002(8).

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

OPINION BELOW 1

JURISDICTION 1

STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF FACTS 4

REASONS FOR GRANTING THE PETITION 8

I. The United States Court of Appeals for the Fifth Circuit failed its duty to review *de novo* the entire record from the United States District Court for the Eastern District of Louisiana when the Fifth Circuit held that petitioner, "Cobb (Mrs. Gibbs) has not proved that Gibbs (Mr. Gibbs) made a knowing misrepresentation, namely, that he knew that his estranged wife was still alive." And the record clearly proves that Gibbs *did* know that his wife was alive when he fraudulently stated that his spouse was deceased 8

TABLE OF CONTENTS – Continued

Page

II. The United States District Court for the Eastern District of Louisiana committed error in refusing to grant plaintiff's Motion For Summary Judgment and the United States Court of Appeals for the Fifth Circuit committed error in vacating the judgment of the United States District Court for the Eastern District of Louisiana and remanding with instruction to dismiss for want of subject matter jurisdiction and the Fifth Circuit's decision puts it in conflict with the Third Circuit, the Seventh Circuit, the Ninth Circuit and with relevant decisions of this Court 9

III. This Court should resolve the split among the circuits as to whether the surviving spouse of a participant, in a retirement pension plan governed by ERISA, who would normally have standing, but for the disputed alleged *de facto* election by the participant, continues to have standing, to challenge the alleged *de facto* election of the participant, as a potential beneficiary within the meaning of 29 U.S.C. § 1002(8) 22

CONCLUSION 26

TABLE OF AUTHORITIES

Page

CASES

Allen v. Western Conference of Teamsters Pension Trust Fund, 788 F.2d 648 (9th Cir.1986) 22, 23

Boggs v. Boggs, 520 U.S. 833 (1997).....15, 25

Coleman v. Champion Int'l Corp., 992 F.2d 530 (5th Cir. 1993).....*passim*

Crawford v. Roane, 53 F.3d 750 (6th Cir. 1995) 11

In re Estate of Sheppard, 658 F.Supp. 729 (C.D.Ill. 1987).....20, 22

Fentron Indus. v. National Shopmen Pension Fund, 674 F.2d 1300 (9th Cir. 1982).....20, 22

Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101 (1989).....*passim*

Gilquist v. Becklin, 675 F.Supp. 1168 (D.Minn. 1987)..... 20

International Ass'n of Bridge, Structural & Ornamental Iron Workers Local No. 111 v. Douglas, 646 F.2d 1211 (7th Cir. 1981), cert. denied, 454 U.S. 866, 102 S.Ct. 328, 70 L.Ed.2d 166 (1981).....20, 22

Mutual Life Ins. Co. of N.Y. v. Yampol, 840 F.2d 421 (7th Cir. 1988) 20, 22

Northeast Dept. ILGWU Health & Welfare Fund v. Teamsters Local Union No. 229 Welfare Fund, 764 F.2d 147 (3d Cir. 1985) 20, 22

Operating Eng'rs Local #428 Pension Trust Fund v. Zambrosky, 650 F.2d 196 (9th Cir. 1981)..... 20

Pilot Life Ins. Co. v. Dedaux, 481 U.S. 41, 107 S.Ct. 1549, 95 L.Ed.2d 39 (1986) 19

TABLE OF AUTHORITIES – Continued

Page

Sladek v. Bell System Management Pension Plan, 880 F.2d 972 (7th Cir. 1989) ..... *passim*

Smart v. State Farm Ins. Co., 868 F.2d 929 (7th Cir. 1989) 19

Thornton v. Evans, 692 F.2d 1064 (7th Cir. 1982) 20

Urban v. Dolgencorp of Tex., Inc., 393 F.3d 572 (5th Cir. 2003) 8

Vilas v. Lyons, 702 F.Supp. 66 (D.Md. 1988) 20

STATUTES

28 U.S.C. § 1254(1) 1

29 U.S.C. § 1001(b) 3, 19

29 U.S.C. § 1002(8) ..... *passim*

29 U.S.C. § 1055(a) 2, 18

29 U.S.C. § 1055(f)(1)(A)(B) 4

29 U.S.C. § 1104(a)(1) 1

29 U.S.C. § 1132(a) 9, 20

29 U.S.C. § 1132(a)(1)(B) 3, 18

29 U.S.C. § 1132(a)(2) 19

OTHER

H.R. Conf. Rep. No. 93-1280, p. 327 (1974) 19

H.R. Rep. No. 533, 93d Cong., 1st Sess. (1973), reprinted in 1974 U.S. Code Cong. & Admin. News 4639 19

TABLE OF AUTHORITIES – Continued

Page

S. Rep. No. 127, 93d Cong., 1st Sess. (1973), reprinted in 1974 U.S. Code Cong. & Admin. News 4838 19

OPINION BELOW

The United States Court of Appeal for the Fifth Circuit held that it lacked jurisdiction because DAISY ESTELLE COBB, widow of OLIVER RAY GIBBS, lacked standing by not meeting the requirements of beneficiary under *Firestone* and under 29 U.S.C. § 1002(8).

JURISDICTION

The United States Court of Appeals for the Fifth Circuit filed it's decision on August 22, 2006. This court has jurisdiction under 28 U.S.C. § 1254(1) to review the circuit court's decision on a Writ Of Certiorari.

STATUTORY PROVISIONS INVOLVED

29 U.S.C. § 1104(a)(1)(A)(i)(ii)(B) and (D)

(1) Subject to sections 1103(c) and(d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and –

(A) for the exclusive purpose of:

(i) providing benefits to participants and their Beneficiaries; and

(ii) defraying reasonable expenses of administering the plan;

(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of

an enterprise of a like character and with like aims;

(C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and

(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter or subchapter III of this chapter.

29 U.S.C. § 1055 (a)(1)(f)(1)(A)(B)

(a) Required contents for applicable plans

Each pension plan to which this section applies shall provide that

(1) In the case of a vested participant who retires under the plan the accrued benefit payable to such participant shall be provided in the form of a qualified joint and survivor annuity.

(f) Marriage requirements for plan

(1) Except as provided in paragraph (2), a plan may provide that a qualified joint and survivor annuity . . . will not be provided unless the participant and spouse had been married through the 1-year period ending on the earlier of –

(A) the participant's annuity starting date, or

(B) the date of the participant's death.

29 U.S.C. § 1002(8)

For purposes of this subchapter:

(8) The term "beneficiary" means a person designated by a participant, or by the terms of an employee benefit plan, who is or may become entitled to a benefit thereunder.

29 U.S.C. § 1132(a)(1)(B)

A civil action may be brought –

(1) by a participant or beneficiary –

(B) To recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

29 U.S.C. § 1001(b)

(b) Protection of interstate commerce and beneficiaries by requiring disclosure and reporting, setting standards of conduct, etc., for fiduciaries

It is hereby declared to be the policy of this chapter to protect interstate commerce and the interests of participants in employee plans and their beneficiaries, by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect thereto, by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts.

STATEMENT OF FACTS

Gibbs was the husband of the Plaintiff-Appellant, Mrs. Gibbs. Gibbs and Mrs. Gibbs were married on July 27, 1937. (See Excerpt No. VI, Page 20, [Exhibit 4, in Doc #17, Part 2, Folder 2 of 2, CS 0089]). They were never divorced. Nor were they ever legally separated. (See Excerpt No. VI, Pages 21, 22, and 23, [Exhibit 4, in Doc #17, Part 2, Folder 2 of 2, CS 0090; CS 0091; CS 0096]). Gibbs died on October 31, 1985 while still married to Mrs. Gibbs. (See Excerpt No. VI, Page 22, [Exhibit 4, in Doc #17, Part 2, Folder 2 of 2, CS 0091]).

Gibbs was a married participant in the Central States, Southeast and Southwest Areas Pension Plan. He was over the age of 55. He had more than twenty years of service. (See Excerpt No. VI, Pages 24-25, [Exhibit 4, in Doc #17, Part 2, Folder 2 of 2, CS 0411-CS 0412]). Therefore, Gibbs was eligible for a Joint and Survivor Pension Benefit ("JSO"). (See Excerpt No. VII, Pages 26-27 [Summary Plan Description ("SPD"), Section 6(b)(ii) at Exhibit 3, in Original Attachments to Doc #21 of C.A. 04-1421 Sec. J, CS 0466-CS 0467]).

Mrs. Gibbs was married to Mr. Gibbs during his entire working life, including when he applied for a retirement pension benefit, when he retired, and when he died. (29 U.S.C. § 1055 (f)(1)(A)(B)).

The Board of Trustees of Central States, as the administrators of this Plan, are the Plan fiduciaries. (See Section 18 in Excerpt No. VII, Page 31 [SPD Section 18 at Exhibit 3, in Original Attachments to Doc #21 of C.A. 04-1421 Sec. J, CS 0477]). Fiduciaries must act solely in the interest of the Plan Participants and beneficiaries and they must exercise prudence in the performance of their Plan duties. (See Section 20(c) in Excerpt No. VII, Page 32 [SPD

Section 20(c) at Exhibit 3, in Original Attachments to Doc #21 of C.A. 04-1421 Sec. J, CS 0480]). 29 U.S.C. § 1104(a)(1).

On August 17, 1979 Gibbs applied for a retirement pension benefit with Central States. (See Excerpt No. VI, Page 16 [Exhibit 4 in Doc #17, Part 2, Folder 2 of 2, CS 0065-CS 0066]). However, Gibbs' application was **fraudulent** and contained **misrepresentation** in that the said Application stated that Gibbs' spouse, Mrs. Gibbs, was deceased. Mrs. Gibbs was not deceased. (See Excerpt No. VI, Page 21 [Exhibit 4, in Doc #17, Part 2, Folder 2 of 2, CS 0090]).

At the time of Gibbs' Application For A Retirement Pension Benefit in 1979, Central States did not require Gibbs to submit documents verifying his marital status, namely, that his spouse was deceased, such as a death certificate. (See Excerpt No. VIII, Page 37 [Defendant's Answer To Supplemental And Amending Complaint By Beneficiary For ERISA Benefits, Page 2, Paragraph 9A from electronic copy of CV 04-1421-J (USCA5 98)]) Central States required nothing. (See Excerpt No. IV, Pages 9-10 [Transcript of Oral Argument, Page 4, Lines 24-25, and Page 5, Lines 1-7 from electronic copy of CV 04-1421-J (USCA5 366-USCA5 367]).

The SPD explicitly provided that a participant was eligible for a JSO if he was married, at least 55 years of age, and eligible to receive a twenty-year service pension benefit (See Excerpt No. VII, Page 26 [SPD Section 6(b)(ii) at Exhibit 3, Exhibit 3, in Original Attachments to Doc #21 of C.A. 04-1421 Sec. J, CS 0467]) **and that a participant would be required to submit documents verifying his marital status.** (See Excerpt

No. VII, Page 28 [SPD Section 6(b)(ii) at Exhibit 3, in Original Attachments to Doc #21 of C.A. 04-1421 Sec. J, CS 0468]). Mr. Gibbs met all of the requirements necessary to be eligible for the JSO.

By letter dated February 4, 1981, from Mrs. Gibbs, Central States was given actual knowledge that misrepresentation had been committed and that Gibbs was married. (See Excerpt No. VI, Page 19, [Exhibit 4, in Doc #17, Part 2, Folder 2 of 2, CS 0070). Now Central States knew that Gibbs was eligible for a JSO. Still Central States did nothing.

Central States did not require Gibbs to submit documents verifying his marital status. (See Excerpt IV, Pages 9-10, [Transcript of Oral Argument, Page 4, Lines 24-25, and Page 5 Lines 1-7]). Even after Central States was given actual knowledge in 1981 by Mrs. Gibbs that the Application of Gibbs for a Retirement Pension Benefit contained misrepresentation and, in fact, Gibbs was married to Mrs. Gibbs, still Central States did nothing.

Mr. Gibbs died on October 31, 1985 and no further benefits were paid by Central States.

By letter dated August 8, 2002, Mrs. Gibbs filed with Central States an Application For A Death Benefit as the surviving spouse of Oliver Ray Gibbs, and, proof that she was never divorced nor legally separated from Oliver Ray Gibbs. [Exhibit 4, in Doc #17, Part 2, Folder 2 of 2, CS 0094-CS 0097]).

By letter dated September 6, 2002 Central States denied the application for Survivor Benefit of Mrs. Gibbs "because he did not elect the joint and 50% Surviving Spouse Option coverage for you at the time he retired in

1979." [Exhibit 4, in Doc #17, Part 2, Folder 2 of 2, CS 0099]).

By letter dated October, 31, 2002, Mrs. Gibbs filed an appeal to the Benefits Claim Review Committee with Central States wherein she appealed the decision dated September 6, 2002 from Central States denying her the surviving spouse benefit. [Exhibit 4, in Doc #17, Part 2, Folder 2 of 2, CS 0103-CS 0116]).

A letter dated April 2, 2003, advised Mrs. Gibbs that the Benefits Claim Appeals Committee determined that Mrs. Gibbs did not "establish that she was eligible for a Joint & Survivor Benefit payable pursuant to the death of Oliver R. Gibbs" because Mr. Gibbs did not choose the Joint & Survivor benefit.

By letter dated September 18, 2003, Mrs. Gibbs filed an appeal to the Board of Trustees of Central States wherein she appealed the decision of the Benefits Claim Appeals Committee dated April 2, 2003.

On December 9, 2003, the Pension Trustee Appellate Review Committee denied Mrs. Gibbs a Joint And Survivor Pension Benefit stating that the communications, acts and omissions by the late Oliver Ray Gibbs, at and around the time of his 1978 [sic] retirement, induced the Pension Fund to rely, and the Pension Fund did, in fact, actually and reasonably rely, upon his intention to reject the JSO.

Mrs. Gibbs appealed this decision in the United States District Court for the Eastern District of Louisiana, but her claim was rejected, so she appealed to the United States Court of Appeals for the Fifth Circuit.

The United States Court of Appeals for the Fifth Circuit vacated the Judgment of the United States District

Court for the Eastern District of Louisiana, and remanded with instruction to dismiss for want of subject matter jurisdiction.

REASONS FOR GRANTING THE PETITION

I. The United States Court of Appeals for the Fifth Circuit failed its duty to review *de novo* the entire record from the United States District Court for the Eastern District of Louisiana when the Fifth Circuit held that petitioner, "Cobb (Mrs. Gibbs) has not proved that Gibbs (Mr. Gibbs) made a knowing misrepresentation, namely, that he knew that his estranged wife was still alive." And the record clearly proves that Gibbs *did* know that his wife was alive when he fraudulently stated that his spouse was deceased.

The United States Court of Appeals for the Fifth Circuit reviews *de novo* the district court's grant of summary judgment using the same standards as the district court. *Urban v. Dolgencorp of Tex., Inc.,* 393 F.3d 572, 573 (5th Cir. 2003).

The Declaration Under Oath by Randy Ray Gibbs, the son of Petitioner, Daisy Estelle Cobb Gibbs, with photographs attached, and the Declaration Under Oath by Eugenia Ketteringham, wife of Randy Ray Gibbs, the daughter-in-law of Petitioner, Daisy Estelle Cobb Gibbs, with photographs attached, in the record, clearly proves that Gibbs did know that his wife was alive when he fraudulently misrepresented that his spouse was deceased. [Exhibit 4, in Doc #17, Part 2, Folder 2 of 2, CS 0165-CS 0171]. It appears that, clearly, the United States Court of

Appeals for the Fifth Circuit did not review *de novo* the entire record from the United States District Court for the Eastern District of Louisiana or the court would have been aware of this proof.

II. The United States District Court for the Eastern District of Louisiana committed error in refusing to grant plaintiff's Motion For Summary Judgment and the United States Court of Appeals for the Fifth Circuit committed error in vacating the judgment of the United States District Court for the Eastern District of Louisiana and remanding with instruction to dismiss for want of subject matter jurisdiction and the Fifth Circuit's decision puts it in conflict with the Third Circuit, the Seventh Circuit, the Ninth Circuit and with relevant decisions of this Court.

Mrs. Gibbs asserted District Court jurisdiction as a beneficiary under Section 502(a) of ERISA, 29 U.S.C. § 1132(a)(1)(B).

The Fifth Circuit held that the issue of whether a particular plaintiff falls within one of the three enumerated classes of litigants, (participants, beneficiaries, or fiduciaries) is a jurisdictional one.

The Fifth Circuit further held that it has "hewed to a *literal construction* of Sec. 1132(a)" on this issue.

Because the issue of standing was one of subject matter jurisdiction, the Fifth Circuit raised it *sua sponte* and directed the parties to submit briefing on the issue. Mrs. Gibbs asserted in her appellate brief and supplemental

briefing that she is a "beneficiary" to whom the plan trustees owe a fiduciary duty.

The Fifth Circuit held that ERISA defines "beneficiary" as "a person *designated* by a participant, **or** by the terms of any employee benefit plan, who is or may become entitled to a benefit thereunder." ERISA § 3(8), 29 U.S.C. § 1002(8) (emphasis added).

In favor of jurisdiction, both the Appellant, Mrs. Gibbs, and the Appellee, Central States, cited a case that involved the definition of "participant," *Firestone Tire & Rubber Co. v. Bruch,* 489 U.S. 101, 117-18 (1989), which held that "to establish that he or she '*may become eligible' for benefits,* a claimant must have a colorable claim that (1) he or she will prevail in a suit for benefits, or that (2) eligibility requirements will be fulfilled in the future." *Id.* (emphasis added). The parties explained that the definition of beneficiary, like the definition of participant, involved the term "is or may become entitled to a benefit," and, therefore, [Cobb] (Mrs. Gibbs) had standing because she had a "colorable claim" that she may be entitled to benefits. The Fifth Circuit disagreed.

The Fifth Circuit held that this case involves the definition of "beneficiary," and requires colorable entitlement to benefits and additionally requires that the "beneficiary" be "designated" as such by the participant or by the terms of the plan.

The Fifth Circuit further held that post-*Firestone*, it has continued to adhere to a "literal construction" of beneficiary and has refused to read the "designation" requirement out of the statutory definition:

> "A beneficiary must prove **both** a "colorable claim" under *Firestone* **and** a "designation" by the participant or the terms of the plan: A beneficiary is "a person *designated* by a participant, or by the terms of an employee benefit plan, who is or may become entitled to a benefit thereunder." 29 U.S.C. Section 1002(8) (emphasis added).

The Court stated that Section 1002(8) defines "beneficiary" as "a person designated by a participant, or by the terms of an employee benefit plan, *who is or may become entitled to a benefit* thereunder." (emphasis added). "Therefore, based on the statutory language, a 'beneficiary' is not anyone who claims to be . . . [but] is one who has a reasonable or colorable claim to benefits." *Crawford v. Roane,* 53 F.3d 750, 754 (6th Cir. 1995).

The Fifth Circuit held that under *Coleman v. Champion Int'l Corp.,* 992 F.2d 530, 533 (5th Cir. 1993) Mrs. Gibbs is not a beneficiary. The court further held that Mr. Gibbs never personally "designated" [Cobb] (Mrs. Gibbs) or anyone else as beneficiary of his Plan assets." *Id.* at 533. "[T]herefore, [Cobb's] (Mrs. Gibbs') assertion of beneficiary status rests upon the language and terms contained in the Plan." *Id.*

In its letter brief, Central States, stated that the plan does not define the term "beneficiary." In her letter brief, Mrs. Gibbs also acknowledged that the plan does not specifically define the surviving spouse as a beneficiary. Mrs. Gibbs' argued, however, that the Plan makes provisions under certain circumstances for benefits to be paid to the surviving spouse. Therefore, if the surviving spouse is eligible to receive those benefits from the Plan, and Mrs. Gibbs shows that she is eligible for those benefits, then she must be considered a beneficiary. Mrs. Gibbs, as the

surviving spouse of a participant who was eligible for a JSO, is a person who, by the terms of the employee benefit plan, is or may become entitled to a benefit thereunder. Mrs. Gibbs has a colorable claim that she will prevail in a suit for benefits. *Firestone Tire and Rubber Co. v. Bruch*. Thus, Mrs. Gibbs is a beneficiary.

The Fifth Circuit held that the fact that Mrs. Gibbs is or may become entitled to a benefit does not necessarily prove the separate requirement that she be "designated" as a beneficiary by the terms of the plan.

The Fifth Circuit held that assuming, *arguendo*, that entitled to benefits under the JSO would count as a "designation," Mrs. Gibbs' claim fails for the same reason that the son's claim failed in *Coleman* – the plan plainly provides that if the decedent received the lifetime only benefit, the spouse is *not entitled* to a JSO benefit after his death.

The court then quoted the plan section on "Pre-Retirement and Post-Retirement Benefit to Spouse" as follows:

> [a] Joint and Survivor Pension Benefit (subject to the election and rejection provisions in "Appendix A" of this Plan) shall be payable to a Pensioner upon Retirement (commencing upon his 55th birthday), or the surviving spouse of a Participant upon his death on or after his 55th birthday but before his Retirement, if the Participant was then eligible for immediate payment of a pension benefit in accordance with Article IV, Sections 2, 3 or 4. Upon death of a Pensioner receiving *this* pension benefit, 50% thereof becomes payable to his surviving spouse. . . .

The court stated that if the plan participant dies after retirement, the spouse is eligible for a "post-retirement" benefit only if the Pensioner was receiving "this" pension benefit, that is, the reduced joint and survivor benefit, not the Lifetime Benefit.

The court further stated that Mrs. Gibbs is not "entitled" to any benefit under it, because she does not satisfy one of the eligibility criteria for it: Gibbs was not receiving "this" benefit (*i.e.,* the joint and survivor benefit); he was receiving Lifetime Only benefit.

The court held, therefore, that, as was the case with the son in *Coleman*, the terms of the plan do not afford Mrs. Gibbs beneficiary status. Under the plan, no pension benefits are to be paid to surviving spouses of those who received benefits under the unreduced Lifetime Benefit option.

However, the court misses the point that Mr. Gibbs should have been receiving a JSO rather than a Lifetime Benefit. The court quoted above from the Plan section on "Pre-Retirement and Post-Retirement Benefit to Spouse" but, the court seems to have ignored the language in the above quote referring to "(subject to the election and rejection provisions in "Appendix A" of this Plan)" which election and rejection provisions provide as follows:

> (3) POST-RETIREMENT OPTION. In addition, for each Pensioner eligible for a Joint and Survivor Pension Benefit, there shall be a separate "post-retirement election period" in which the Participant has the right to elect in writing that such benefit will not be payable upon his death after Retirement. Said "post-retirement election period" shall commence on the actual date of Retirement of

> the Pensioner (upon attaining his Twenty-Year Service Retirement Date, his Early Retirement Date or his Normal Retirement) or on the date he is eligible and applies for a Vested Pension Benefit and shall extend until the ***90th day*** after the Pension Fund sends the written notice required by the next sentence. Within 7 days after said "post-retirement election period" commences, or a reasonable time thereafter, the Pension Fund shall send written notice to the Participant informing him of the availability of a Joint and Survivor Pension Benefit and also explaining the terms and conditions of such benefit and the comparative financial effect upon the amount of his pension benefits if he elects in writing that such benefit shall not be payable to his spouse upon his subsequent death. (emphasis added).

Central States provided no written notice to Mr. Gibbs and Mr. Gibbs made no election.

The plan provided under it's **default provisions** that if the participant was qualified for a JSO, as Mr. Gibbs was, because he was married, he was over 55 years of age and he had over 20 years of service, he was required to elect to reject the JSO and, if he did not do so in accordance with the terms of the plan, his benefit would be paid as a JSO.

The court attempted to distinguish *Sladek v. Bell System Management Pension Plan,* 880 F.2d 972, 976-78 (7th Cir. 1989), which was decided before *Coleman*, and the court said that *Sladek* is distinguishable because there the benefit plan itself designated plaintiff, the deceased

participant's spouse, as survivor annuitant, unless the participant elected to receive an unreduced lifetime only benefit. In *Sladek* the participant elected to receive the lifetime only benefit and the surviving spouse argued that the election was voidable because the participant was incompetent to make a decision because of Alzheimer's Disease. The court said that here Mr. Gibbs' *de facto* election of the Lifetime Benefit is not voidable even if he misrepresented that his wife was deceased because Mr. Gibbs retired in 1978 [sic] and he was entitled to select the Lifetime Benefit without the consent of his spouse. The court added a footnote explaining that before 1984 the spouse of a participant was not required to join in a JSO election. *Boggs v. Boggs,* 520 U.S. 833, 843 (1997). The court then concluded that his misrepresentation was harmless and does not render his election voidable.

However, Mr. Gibbs' misrepresentation was not harmless. Mr. Gibbs ***was*** entitled to ***elect*** the Lifetime Benefit without the consent of his spouse. However, Mr. Gibbs ***was required*** to make an ***election***. Mr. Gibbs never made an election of any kind. Mr. Gibbs did ***not*** reject the JSO nor did he ***elect*** the Lifetime Only Benefit. Contrary to the clear terms of the Plan and the SPD, Central States unilaterally awarded Mr. Gibbs a Lifetime Benefit. He was required to elect or to reject the JSO ***first before*** he would become eligible for a Lifetime Benefit. The Plan and the SPD contained explicit and detailed provisions that set forth the procedure whereby Mr. Gibbs was to make an election to reject the JSO, *supra*.

These provisions of the Plan and of the SPD were not complied with.

The provisions of the Plan and of the SPD clearly set forth the terms whereby a participant, such as Mr. Gibbs, was eligible for a JSO. Under those terms, Mr. Gibbs clearly was eligible for a JSO. (See Excerpt No. VII, Pages 26-27 [SPD, Section 6(b)(ii) at Exhibit 3, in Original Attachments to Doc #21 of C.A. 04-1421 Sec. 7, CS 0466-0467]).

The provisions of the Plan and of the SPD clearly set forth that a participant, such as Mr. Gibbs, would be required to verify his marital status. Mr. Gibbs clearly did not verify his marital status and clearly Mr. Gibbs was not required by the Trustees of Central States to verify his marital status. (See Excerpt No. VII, Page 37 [Defendant's Answer To Supplemental And Amending Complaint By Beneficiary For ERISA Benefits, Page 2, Paragraph 9A from electronic copy of CV 04-1421-J (USCA5 98)] (See Excerpt No. IV, Pages 9-10 [Transcript of Oral Argument, Page 4, Lines 24-25, and Page 5, Lines 1-7 from electronic copy of CV 04-1421-J (USCA5 366-USCA5 367]).

The provisions of the Plan and of the SPD clearly set forth the procedures whereby a participant, such as Mr. Gibbs, who was eligible for a JSO, would be required to make an election to reject the JSO and, if the participant, rejected the JSO then he would become eligible for a Lifetime Benefit. Clearly, as the Fifth Circuit found, Mr. Gibbs never made any election whatsoever.

The fact that the Plan contains detailed provisions establishing when a participant is eligible for a JSO, and, how a participant is to be awarded a JSO or a Lifetime Benefit, clearly indicates that these procedures were not intended to be ignored or that another procedure was acceptable.

In 1979, Mr. Gibbs could elect the Lifetime Benefit without the consent of his wife. But, the Trustees could not allow the provisions of the Plan to be ignored. Mr. Gibbs first had to be provided with an election and he had to reject the JSO before he could become eligible for a Lifetime Benefit. He could make this *election* without the consent of his wife, but, he never made an *election*. He simply committed misrepresentation. He said his wife was deceased, and the Trustees awarded him a Lifetime Benefit. Even when the Trustees were informed in 1981 that Mr. Gibbs had clearly committed misrepresentation and that he did have a surviving spouse, the Trustees of the Plan did not adjust his pension benefit even though the Plan said

> "any misrepresentation in any application submitted by a claimant to the Pension Fund, for pension or other benefits, *shall* constitute grounds for *adjustment* of a claim and of the requested benefits, for recovery by the Pension Fund of any benefit payments made in reliance on said misrepresentation, and for any other equitable legal remedies which may be available to the Pension Fund."

There is even strong evidence in the record to indicate that Central States knew in 1979 that Mr. Gibbs had a spouse because his award letter awarding him a lifetime benefit also awarded the "survivor pension to his spouse." (Exhibit 4, CS 0069) If Central States knew that Mr. Gibbs had a spouse, the terms of the Plan required that he be given written notice and that he make an election to reject the JSO before he could receive the Lifetime Benefit. The Fifth Circuit said that Plan's terms provide that in case of a misrepresentation, Central States "may" recover any benefit payments that Gibbs was not entitled to receive,

not that Central States "will" or "must" recover such benefits.

However, the terms of the Plan and of the SPD provide that misrepresentation *"shall"* constitute grounds for *adjustment* of the claim. Even if the Plan were to be silent on misrepresentation, since the election period had closed, and, Mr. Gibbs had made no election to reject the JSO, Central States was required by the default provisions of the Plan and of the SPD to award Mr. Gibbs a JSO.

The Fifth Circuit held that Mrs. Gibbs was never a beneficiary because Mr. Gibbs never received the JSO Post-Retirement Benefit, but only a Lifetime Benefit, which did not entitle Mrs. Gibbs to benefits after Mr. Gibbs' death. However, as set forth above, had Central States followed the terms and provisions of it's own Plan and SPD, Mrs. Gibbs would be a beneficiary.

As set forth in *Sladek v. Bell* this action is brought by Mrs. Gibbs as a potential beneficiary pursuant to 29 U.S.C. § 1132(a)(1)(B) alleging that the Trustees of Central States are the Plan Administrators and the Plan Fiduciaries, and, because of the Trustees malfeasance, Mr. Gibbs was wrongfully awarded a Maximum Lifetime Pension Benefit rather than a JSO.

The Plan presumed that the survivor annuity is selected unless expressly declined and Mrs. Gibbs is entitled to a JSO by reason of the misrepresentation of Mr. Gibbs and his failure to reject the JSO and the failure of the Trustees to properly follow the terms required by the Plan and the SPD. See 29 U.S.C. § 1055(a).

Appellant, Mrs. Gibbs, should have standing as a beneficiary by reason of the misrepresentation of Mr.

Gibbs and his failure to reject the JSO and the failure of the Trustees to properly follow the terms required by the Plan and the SPD and the default terms of the Plan which provided that if Mr. Gibbs did not properly reject the JSO that a JSO would be awarded.

As pointed out in *Sladek* the purposes of ERISA are two fold, to protect interstate commerce and to protect participants and beneficiaries of such plans.

It is . . . to be the policy of this Act to protect . . . the interest of participants in employee benefit plans and their beneficiaries . . . by providing . . . ready access to the Federal courts. 29 U.S.C. § 1001(b). As stated in *Sladek*, "we are not required, and it is not proper for us to give an unduly cramped reading to those provisions granting standing to certain classes of persons under the Act, *i.e.*, participants, beneficiaries, or fiduciaries." 29 U.S.C. § 1132(a)(2).

As stated in *Sladek* ERISA was not designed to protect merely those beneficiaries already receiving benefits, but also "putative" beneficiaries. *Smart v. State Farm Ins. Co.*, 868 F.2d 929, 933 (7th Cir. 1989).

As stated in *Sladek*, the Conference Report on the statute clearly states that "civil actions may be brought by a . . . beneficiary . . . to clarify rights to receive future benefits under the Plan . . . ." H.R. Conf. Rep. No. 93-1280, p. 327 (1974) (quoted in *Pilot Life Ins. Co. v. Dedaux*, 481 U.S. 41, 55, 107 S.Ct. 1549, 1557, 95 L.Ed.2d 39 (1986)) (emphasis added). See generally S. Rep. No. 127, 93d Cong., 1st Sess. (1973), reprinted in 1974 U.S. Code Cong. & Admin. News 4838; H.R. Rep. No. 533, 93d Cong., 1st Sess. (1973), reprinted in 1974 U.S. Code Cong. &

Admin. News 4639; see also *Mutual Life Ins. Co. of N.Y. v. Yampol*, 840 F.2d 421, 425 (7th Cir. 1988); *Thornton v. Evans*, 692 F.2d 1064, 1077 (7th Cir. 1982).

As stated in *Sladek*, by negative implication *Vilas v. Lyons,* 702 F.Supp. 66 (D.Md. 1988) stands for the proposition that the spouse of a plan participant is a beneficiary under ERISA and that, absent a valid waiver or election, the spouse has standing to maintain an action under Sec. 1132(a). See also *Operating Eng'rs Local #428 Pension Trust Fund v. Zambrosky,* 650 F.2d 196, 201 (9th Cir. 1981); *Gilquist v. Becklin*, 675 F.Supp. 1168, 1169 (D.Minn. 1987).

As stated in *Sladek*, "the Third Circuit has taken an even more expansive reading of the standing provisions in ERISA, citing the language of the Ninth Circuit to the effect that "a party has standing to sue . . . if his alleged injury 'fall[s] arguably within the zone of interests protected by the statute allegedly violated, so long as the 'the statute itself does not preclude the suit.'" *Northeast Dept. ILGWU Health & Welfare Fund v. Teamsters Local Union No. 229 Welfare Fund*, 764 F.2d 147, 152 (3d Cir. 1985) (quoting *Fentron Indus. v. National Shopmen Pension Fund*, 674 F.2d 1300, 1304 (9th Cir. 1982)). See also *International Ass'n of Bridge, Structural & Ornamental Iron Workers Local No. 111 v. Douglas*, 646 F.2d 1211 (7th Cir. 1981), cert. denied, 454 U.S. 866, 102 S.Ct. 328, 70 L.Ed.2d 166 (1981); *In re Estate of Sheppard*, 658 F.Supp. 729, 734 n.9 (C.D.Ill. 1987).

As stated in *Sladek*:

> "It seems strange to argue that the reference to "beneficiaries" in Sec. 1002(8) is limited to designated beneficiaries – apparently even if the very

> designation denying one's status as beneficiary is voidable. First, we would simply note that Congress is no less able to utilize the English language than the courts, and if Congress had meant to limit Sec. 1002(8) to designated beneficiaries, it'd need only to have done so. More importantly, we can imagine a situation in which the plan participant is, by all accounts, mad and elects to receive full pension benefits in his fit of madness. We can further imagine a plan review board, whether through personal animus, shear caprice, or simple mistake, denying a petition to have the participant's election set aside. Surely no court would bar such a plaintiff from Federal court because standing was based upon 'assumed evidentiary finding in [plaintiff's] favor.' Perhaps it could be argued that the court's imagination is too vivid and that the situation posed is not the case before this Court, but it is drawing upon the paradigm that the bankruptcy of the competing analysis is exposed. It is simply not reasonable to dismiss the instant complaint on standing grounds. To deny that the instant appellant has standing would be to deny that all potential beneficiaries have standing so long as an election, however invalid, had been made. This, we think, would elevate the making of an election to a ritualistic talisman, and this we are not willing to do."

As stated in *Sladek*, although the appellant was not clearly designated as a beneficiary by her husband, she was a beneficiary under the Plan in the absence of a valid election.

In the instant case, if the appellant were to be successful in proving her allegations, she would become a presumptive beneficiary under the Act.

III. This Court should resolve the split among the circuits as to whether the surviving spouse of a participant, in a retirement pension plan governed by ERISA, who would normally have standing, but for the disputed alleged *de facto* election by the participant, continues to have standing, to challenge the alleged *de facto* election of the participant, as a potential beneficiary within the meaning of 29 U.S.C. § 1002(8).

There is a split of authority among the circuits as to the issue of whether a potential beneficiary under a retirement pension plan governed by ERISA should have standing to sue.

The Third Circuit has taken an expansive reading of the standing provisions in ERISA, citing the language of the Ninth Circuit to the effect that "a party has standing to sue . . . if his alleged injury 'fall[s] arguably within the zone of interests protected by the statute allegedly violated,' so long as 'the statute itself does not preclude the suit.'" *Northeast Dept. ILGWU Health & Welfare Fund v. Teamsters Local Union No. 229 Welfare Fund*, 764 F.2d 147, 152 (3d Cir. 1985) (quoting *Fentron Indus. v. National Shopmen Pension Fund,* 675 F.2d 1300, 1304 (9th Cir. 1982)). See also *International Ass'n of Bridge, Structural & Ornamental Iron Workers Local No. 111 v. Douglas,* 646 F.2d 1211 (7th Cir. 1981), cert. denied, 454 U.S. 866, 102 S.Ct. 328, 70 L.Ed.2d 166 (1981); *In re Estate of Sheppard,* 658 F.Supp. 729, 734 n.9 (C.D.Ill. 1987).

The Seventh Circuit, *Sladek v. Bell System Management Pension Plan,* 880 F.2d 972, 976-78 (7th Cir. 1989), in searching for the appropriate method of analysis, looked to the Ninth Circuit decision in *Allen v. Western Conference of*

Teamsters Pension Trust Fund, 788 F.2d 648 (9th Cir. 1986). The Ninth Circuit held that ERISA beneficiaries are limited to actual spouses and, insofar as the participant's divorce had not become final as of the time of his second marriage, his marriage to the plaintiff was void. As such, the plaintiff was merely a "putative spouse" and lacked standing under the Act. *Id.* at 649-50.

The Seventh Circuit, in *Sladek*, said that what is crucial for our purposes is the fact that, on it's face, the complaint in *Allen* appeared to be a routine claim for benefits by the surviving spouse in her capacity as beneficiary. *Id.* at 649. The Ninth Circuit was willing to pierce the surface of the complaint, however, and examine the validity of the underlying agreement (the marriage) which gave rise to the plaintiff's status as a beneficiary. The *Allen* court held that the agreement, *i.e.*, the marriage, was void and that the plaintiff lacked standing. Id. at 650.

The Seventh Circuit held in *Sladek* that "although the appellant was clearly not designated as a beneficiary by her husband, she was a beneficiary under the Plan in the absence of a valid election.

That is *exactly* the situation in this case.

The Fifth Circuit in *Coleman* rejected the "zone of interest" analysis.

In this present case, the Fifth Circuit held that ERISA defines "beneficiary" as "a person *designated* by a participant, or by the terms of any employee benefit plan, who is or may become entitled to a benefit."

In favor of jurisdiction, both the Appellant, Mrs. Gibbs, and the Appellee, Central States, cited *Firestone Tire & Rubber Co. v. Bruch,* which held that "to establish

that he or she '*may become eligible' for benefits,* a claimant must have a colorable claim that (1) he or she will prevail in a suit for benefits, or that (2) eligibility requirements will be fulfilled in the future." (emphasis added). The parties explained that the definition of beneficiary, like the definition of participant, involved the term "is or may become entitled to a benefit," and, therefore, [Cobb] (Mrs. Gibbs) had standing because she had a "colorable claim" that she may be entitled to benefits. The Fifth Circuit disagreed.

The Fifth Circuit further held that post-*Firestone*, it has continued to adhere to a "literal construction" of the three classes of plaintiffs with standing and it has refused to read the "designation" requirement out of the statutory definition:

> "A beneficiary must prove **both** a "colorable claim" under *Firestone* **and** a "designation" by the participant or the terms of the plan: A beneficiary is "a person *designated* by a participant, or by the terms of an employee benefit plan, who is or may become entitled to a benefit thereunder." 29 U.S.C. Section 1002(8)" (emphasis added).

The Fifth Circuit further held that under *Coleman,* 992 F.2d at 533-34 Mrs. Gibbs is not a beneficiary. Mr. Gibbs never personally "designated" [Cobb] (Mrs. Gibbs) or anyone else as beneficiary of his Plan assets." *Id.* at 533. "[T]herefore, [Cobb's] (Mrs. Gibbs') assertion of beneficiary status rests upon the language and terms contained in the Plan." *Id.*

The Fifth Circuit held that Mrs. Gibbs' claim fails for the same reason that the son's claim failed in *Coleman* – the plan plainly provides that if the decedent received the

lifetime only benefit, the spouse is *not entitled* to a JSO benefit after his death.

The court stated that if the plan participant dies after retirement, the spouse is eligible for a "post-retirement" benefit only if the Pensioner was receiving "this" pension benefit, that is, the reduced joint and survivor benefit, not the Lifetime Benefit.

The court further stated that Mrs. Gibbs is not "entitled" to any benefit under it, because she does not satisfy one of the eligibility criteria for it: Gibbs was not receiving "this" benefit (*i.e.,* the joint and survivor benefit); he was receiving Lifetime Only benefit.

The court held, therefore, that, as was the case with the son in *Coleman*, the terms of the plan do not afford Mrs. Gibbs beneficiary status. Under the plan, no pension benefits are to be paid to surviving spouses of those who received benefits under the unreduced Lifetime Benefit option.

The court said that here Mr. Gibbs' *de facto* election of the Lifetime Benefit is not voidable even if he misrepresented that his wife was deceased because Mr. Gibbs retired in 1978 [sic] and he was entitled to select the Lifetime Benefit without the consent of his spouse. The court added a footnote explaining that before 1984 the spouse of a participant was not required to join in a JSO election. *Boggs v. Boggs,* 520 U.S. 833, 843 (1997). The court then concluded that his misrepresentation was harmless and does not render his election voidable.

However, as the court found, Mr. Gibbs made no election of any kind. Mr. Gibbs was qualified for a JSO. Therefore, he had to elect to reject the JSO before he

would become eligible for a Lifetime Benefit. Since he made no election, under the default provisions of the plan, his benefit must be paid as a JSO.

CONCLUSION

The court should grant the petition of writ of certiorari and reverse the decision of the Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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461 F.3d 632

In the
United States Court of Appeals
for the Fifth Circuit

No. 05-30906
Summary Calendar

DAISEY ESTELLE COBB,
WIDOW OF OLIVER RAY GIBBS,

Plaintiff-Appellant,

VERSUS

CENTRAL STATES, SOUTHWEST AND
SOUTHEAST AREAS PENSION FUND,

Defendant-Appellee.

Appeal from the United States District Court
for the Eastern District of Louisiana
No 2:04-CV-1421

(Filed Aug. 22, 2006)

Before SMITH, GARZA and PRADO, Circuit Judges.

JERRY E. SMITH, Circuit Judge:

Daisy Cobb appeals an adverse benefit determination by Central States, Southwest and Southeast Areas Pension Plan ("Central States"). We vacate the judgment and remand with instruction to dismiss for want of subject matter jurisdiction.

I.

In about August 1979, Oliver Gibbs submitted an "Application for a Retirement Pension Benefit" to Central States stating that he was retiring on October 26, 1979. Central States is a multiemployer pension plan. At the time he submitted his application, Gibbs was married to, but separated for thirteen years from, Cobb. In his pension application, Gibbs represented under oath that his spouse was "deceased." Gibbs died in 1985. In 2002 Cobb submitted a claim for the Joint and Survivor Pension Benefit.

When he retired, Gibbs was eligible to receive an unreduced lifetime pension of $675.00 per month, with no pension benefits after his death (the "Lifetime Benefit"). Central States' Pension Plan also allowed a participant to receive or reject the Joint and Survivor Pension Benefit ("JSO") if he met the three eligibility criteria for this plan. Generally, this benefit provides a reduced pension to the participant, and 50% of the reduced lifetime pension as a lifetime monthly income to his/her spouse after the participant's death.

Gibbs would have received a reduced lifetime pension of $588.60 per month, but only by meeting several conditions, including that he had to be married at the time of his retirement. The plan provided that

> [i]n order to be eligible for this pension benefit, you MUST meet each of the following requirements AT THE TIME OF YOUR RETIREMENT:
>
> – you MUST be married; and
>
> – you MUST be at least age 55; and
>
> – you MUST be eligible to receive a Twenty-Year Service Pension Benefit, an Early Retirement

Pension Benefit or a Vested Pension Benefit from this Plan.

Because Gibbs represented that his spouse was deceased, he did not meet the criteria, so he was never sent an election form for the JSO. He started receiving unreduced lifetime benefits in November 1979. In February 1981 (before Gibbs's death), Cobb contacted Central States and advised it that she was Gibbs's spouse. Cobb stated that she and Gibbs had been separated for "about 15 years" but that they were legally married. Cobb also stated that Gibbs was receiving a pension benefit and that she wanted to receive some of it. Central States informed Cobb that she was not eligible to receive any part of Gibbs's pension because the Pension Plan provided that "[a]ll Pension Benefits provided by this Plan shall be paid directly to the Pensioner, and not to any creditor or other person not eligible for such benefits."

In 2002, Cobb requested benefits from Central States by submitting an Application for Death Benefit. In September, Central States advised Cobb that she was not eligible to receive any benefits because Gibbs did not elect the "Joint and 50% Surviving Spouse Option" when he retired in 1979. Cobb appealed this adverse benefit determination to Central States' Benefits Claim Appeals Committee.

In April 2003, Central States advised her that her appeal was rejected because Gibbs had not elected to have his benefit paid in the JSO form when he retired. Cobb exhausted the administrative appeals process when her appeal was considered by the trustees, who determined that "the communications, acts and omissions by the late Oliver Ray Gibbs, at and around the time of his 1978 [sic]

retirement, induced the Pension Fund to rely, and the Pension Fund did in fact actually and reasonably rely, upon his intention to reject the JSO." Cobb appealed this decision in court, but her claim was rejected, so she appeals.

II.

Cobb asserts district court jurisdiction under section 502(a) of ERISA, 29 U.S.C. 1132(a). That provision, however, limits those who can maintain suit under the statute to "participants," "beneficiaries," or "fiduciaries." *Coleman v. Champion Int'l Corp.*, 992 F.2d 530, 533 (5th Cir. 1993). Because "[w]here Congress has defined the parties who may bring a civil action founded on ERISA, we are loathe [*sic*] to ignore the legislature's specificity," standing to bring an action founded on ERISA is a "jurisdictional" matter.[1]

Accordingly, the issue of whether a particular plaintiff falls within one of the three enumerated classes of litigants (participants, beneficiaries or fiduciaries) is a jurisdictional one. *Hermann,* 845 F.2d at 1289. This court has "hewed to a *literal construction* of § 1132(a)" on this issue. *Id.* (emphasis added).

Because the issue of standing is one of subject matter jurisdiction, we raised it *sua sponte* and directed the parties to submit briefing on the issue. Although the basis

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[1] *Hermann Hosp. v. MEBA Med. & Benefits Plan,* 845 F.2d 1286, 1288-89 (5th Cir. 1988) (analyzing ERISA standing as a question of subject matter jurisdiction); *accord Ward v. Alternative Health Delivery Sys., Inc.*, 261 F.3d 624, 627 (6th Cir. 2001) (finding that lack of standing warrants dismissal for lack of subject matter jurisdiction).

for inclusion in one of the three jurisdictional classes of ERISA litigants is uncertain from Cobb's complaint, she claims in her appellate brief and supplemental briefing that she is a "beneficiary" to whom the plan trustees owed a fiduciary duty.[2]

ERISA defines "beneficiary" as "a person *designated* by a participant, or by the terms of any employee benefit plan, who is or may become entitled to a benefit thereunder." ERISA § 3(8), 29 U.S.C. § 1002(8) (emphasis added). In favor of jurisdiction, the parties cite a case that involved the definition of "participant," *Firestone Tire & Rubber Co. v. Bruch,* 489 U.S. 101, 117-18 (1989), which held that "to establish that he or she *'may become eligible' for benefits,* a claimant must have a colorable claim that (1) he or she will prevail in a suit for benefits, or that (2) eligibility requirements will be fulfilled in the future." *Id.* (emphasis added). The parties explain that given that the definition of beneficiary, like the definition of participant,

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[2] Cobb has never purported to be, a "participant," or "fiduciary" as defined by ERISA; nor can she qualify within those two categories. Section 3(7) of ERISA, 29 U.S.C. § 1002(7), defines "participant" as any employee or former employee of an employer, or any member or former member of an employee organization, who is or may become eligible to receive a benefit of any type from an employee benefit plan which covers employees of such employer or members of such organization, or whose beneficiaries may be eligible to receive any such benefit. Section 3(21) of ERISA, 29 U.S.C. 1002(21), defines "fiduciary" as a person who (i) exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) has any discretionary authority or discretionary responsibility in the administration of such plan.

involves the term "is or may become entitled to a benefit," Cobb has standing because she has a "colorable claim" that she may be entitled to benefits. We disagree.

This case involves the definition of "beneficiary," not "participant." Although both require "colorable" entitlement to benefits, the definition of beneficiary additionally requires something that the definition of participant does not: that the "beneficiary" be "designated" as such by the participant or by the terms of the plan.[3] Post-*Firestone,* this court has continued to adhere to a "literal construction" of the three classes of plaintiffs with standing, and we have refused to read the "designation" requirement out of the statutory definition: A beneficiary must prove both a "colorable claim" under *Firestone* and a "designation" by the participant or the terms of the plan: A beneficiary is "a person *designated* by a participant, or by the terms of an employee benefit plan, who is or may become entitled to a benefit thereunder." 29 U.S.C. § 1002(8) (emphasis added).

In *Coleman* we held that a pension plan participant's son, who was his descendant, heir at law, and the representative of his estate, was not a "beneficiary" of the plan with standing to sue under ERISA because (1) the participant never designated the son to receive benefits under the plan, and (2) the terms of the plan, which directed the

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[3] Section 1002(7) defines "participant" as any "employee or former employee . . . *who is or may become eligible to receive . . . employee benefit*[s]" (emphasis added). Section 1002(8) defines "beneficiary" as "a person designated by a participant, or by the terms of an employee benefit plan, *who is or may become entitled to a benefit* thereunder" (emphasis added). "Therefore, based on the statutory language, a 'beneficiary' is not anyone who claims to be one. . . . [but] is one who has a reasonable or colorable claim to benefits." *Crawford v. Roane,* 53 F.3d 750, 754 (6th Cir. 1995).

Trustees to designate a beneficiary from the group of the decedent's spouse, descendants, heirs at law, and representatives of the estate, if there were any benefits "payable," could not designate a beneficiary, because there were no benefits payable (The participant received benefits under the "Lifetime Only" option, as here.):

> Charlie Coleman elected to remain under the normal Lifetime Only Income payment option. While this Plan option provides the greatest amount of monthly income, the Plan states clearly that, under this option, at the time of the participant's death, all pension benefits cease.
>
> Because no pension benefits were payable at the time of Charlie Coleman's death, the Retirement Committee was not, and is not now, authorized to name a beneficiary from the list in Section 4.2. As such, the terms of Plan Section 4.2 do not afford Coleman beneficiary status as contemplated in § 1132. Coupled with the fact that Charlie Coleman did not name his son as his beneficiary, this conclusion forecloses any statutory basis for Coleman's assertion of standing.

Coleman, 992 F.2d at 533-34.

Under this precedent, Cobb is not a beneficiary. Gibbs never personally "designated [Cobb] or anyone else as beneficiary of his Plan assets." *Id.* at 533. "[T]herefore, [Cobb's] assertion of beneficiary status rests upon the language and terms contained in the Plan." *Id.*

In its letter brief, Central States admits that the plan does not define the term "beneficiary." In her letter brief, Cobb also acknowledges that the plan does not specifically define the surviving spouse as the beneficiary. She argues, however, that because the plan allows for benefits to be

paid to surviving spouses of individuals receiving benefits under the JSO plan, she is or may become entitled to a benefit under the plan, which makes her a beneficiary. Again, the fact that Cobb is or may become entitled to a benefit does not necessarily prove the separate requirement that she be "designated" as a beneficiary by the terms of the plan.

Assuming, *arguendo,* that entitlement to benefits under the JSO would count as a "designation," Cobb's claim fails for the same reason that the son's claim failed in *Coleman* – the plan plainly provides that if the decedent received the lifetime-only benefit, the spouse is *not entitled* to a JSO benefit after his death. The plan section on "Pre-Retirement and Post-Retirement Benefit to Spouse" explains that

> [a] Joint and Survivor Pension Benefit (subject to the election and rejection provisions in "Appendix A" of this Plan) shall be payable to a Pensioner upon Retirement (commencing upon his 55th birthday), or the surviving spouse of a Participant upon his death on or after his 55th birthday but before his Retirement, if the Participant was then eligible for immediate payment of a pension benefit in accordance with Article IV, § 2, 3 or 4. Upon death of a Pensioner receiving *this* pension benefit, 50% thereof becomes payable to his surviving spouse. . . .

That is, if the plan participant dies after age 55 but before retirement, the spouse is eligible for a "pre-retirement" benefit if the pensioner was eligible to receive a pension at the time of death. If the plan participant dies after retirement, the spouse is eligible for a "post-retirement" benefit only if the Pensioner was receiving

"this" pension benefit, that is, the reduced joint and survivor benefit, not the Lifetime Benefit.

Gibbs did not die before retirement, so only the post-retirement provision could apply here. But Cobb is not "entitled" to any benefit under it, because she does not satisfy one of the eligibility criteria for it: Gibbs was not receiving "this" benefit (*i.e.* the joint and survivor benefit); he was receiving the lifetime-only benefit.[4]

Therefore, as was the case with the son in *Coleman,* the terms of the plan do not afford Cobb beneficiary status. Under the plan, no pension benefits are to be paid to surviving spouses of those who received benefits under the unreduced Lifetime Benefit option.[5]

Although it may not be advisable to interpret the terms of the plan at this jurisdictional stage, we are bound to do so by *Coleman,* which interpreted the term "payable" under the plan to determine whether the descendant and heir of the plan participant qualified as a beneficiary. Further, the definition of "beneficiary" directs the courts to look to the terms of the plan at the jurisdictional stage to decide whether the terms "designate" a plaintiff as a

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[4] *See also* section 17 ("If you die *while receiving* a Joint and Survivor Pension Benefit, your spouse will receive one-half of your pension for the rest of his or her life. . . .") (emphasis added).

[5] This case is also similar to *Lerra v. Monsanto Co.,* 521 F. Supp. 1257 (D. Mass. 1981), in which the widow of a former plan participant alleged that the defendant had failed to disclose sufficient benefit information to the decedent at the time he made his election to receive pension benefits as a "single life annuity." The court held that it lacked jurisdiction because plaintiff, never having been designated as a joint annuitant, was not a "beneficiary" and thus lacked standing to sue under ERISA.

beneficiary or whether they provide plaintiff with a colorable claim for benefits.[6]

We are aware that in *Sladek v. Bell System Management Pension Plan,* 880 F.2d 972, 976-78 (7th Cir. 1989), which was decided before *Coleman,* the court gave the term "beneficiary" a broader reading than the "literal construction" we provided in *Coleman. See id.* at 976 (noting that "it is not proper for us to give an unduly cramped reading to those provisions granting standing to certain classes of persons under the Act, i.e., participants, beneficiaries, and fiduciaries. . . . [T]his Court has consistently given the definition of 'fiduciary' found in § 1002(9) a 'broad reading' "). *Sladek* relied *inter alia* on the "zone of interest" analysis that we rejected in *Coleman.*

Furthermore, *Sladek* is distinguishable because there the benefit plan itself designated plaintiff, the deceased participant's spouse, as survivor annuitant, unless the participant elected to receive an unreduced lifetime-only benefit. Although in *Sladek* the participant elected to receive the lifetime-only benefit, the surviving spouse argued that the election was voidable because the participant was incompetent to make a decision because of Alzheimer's Disease. In contrast, here, Gibbs's *de facto* election of the Lifetime Benefit[7] is not voidable even if he

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[6] *See, e.g., Crawford,* 53 F.3d at 755 (interpreting a plan provision providing that "a spouse of a married participant must consent to any beneficiary designation which does not name the spouse as a sole beneficiary of the participant's death benefit" as not providing a colorable claim to beneficiary status (and standing) to participant's children, where the spouse did not consent to a beneficiary other than her to be named as a beneficiary).

[7] The Plan documents explain that when an application for retirement benefits is made, an election form will be mailed to those

(Continued on following page)

misrepresented that his wife was deceased.[8] Because Gibbs retired in 1978, he was entitled to select the Lifetime Benefit without the consent of his spouse.[9] Therefore, his harmless misrepresentation does not render his election voidable.

Cobb also argues in her letter brief that alternatively, she has standing under the "but for" analysis in *Christopher v. Mobil Oil Corp.*, 950 F.2d 1209 (5th Cir. 1992). We rejected that argument in the analogous situation we faced in *Coleman,* where we explained that

> *Christopher* clearly poses a different scenario than [*sic*] the one we face today. In *Christopher,* this court restored ERISA standing to individuals who

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eligible for the JSO. Because Gibbs declared under oath that his wife was deceased, he was not eligible for the JSO, which requires that the participant be married – that is, that the spouse be alive – at the time the JSO eligibility is determined.

It would have been pointless for the Plan to send Gibbs an election form as Cobb suggests: what was there to elect? Accordingly, the default provision, that in the absence of an election of the "Lifetime Benefit," the pension will be paid as a "Joint and Survivor Benefit," is inapplicable; it applies only if an employee is entitled to the JSO. Therefore, by declaring that his wife was deceased, Gibbs rendered himself eligible for only the Lifetime Benefit.

[8] It is uncertain whether Gibbs did make a misrepresentation. Cobb has not proved that Gibbs made a knowing misrepresentation, namely that he knew that his estranged wife was still alive.

[9] Before 1984, the spouse of a participant was not required to join in an JSO election. *Boggs v. Boggs,* 520 U.S. 833, 843 (1997). "It was not until August 23, 1984, to be effective January 1, 1985, that congress amended 29 U.S.C. § 1055 to require pension plans to offer joint and survivor annuities unless otherwise elected by the participant and his spouse." *Williams v. Wright,* 783 F. Supp. 1392, 1400-01 (S.D. Ga. 1992) (citing Retirement Equity Act of 1984, P.L. 98-397, Title I, Section 103(a), 98 Stat. 1429). The amended act does not apply to Cobb, "because it did not take effect until January 1, 1985." *Id.*

> had standing but were divested of that standing through the ERISA violations of their employer. The employees alleged that they had been wrongfully induced to retire, and but for the ERISA violation, would have continued their employment and plan participation, thereby retaining status to sue under ERISA.
>
> In the present case, *Coleman* never had standing to sue under ERISA since he was neither a Plan participant nor a beneficiary. Thus, even if the Coleman's allegations of ERISA improprieties were true, those violations could not be said to have divested him of his status to sue. As such, *Christopher* does not help the appellant.

Coleman, 992 F.2d at 535.

The instant case is similar to *Coleman* in that Cobb was never a plan participant or a beneficiary, because Gibbs never received the JSO post-retirement, but only a Lifetime Benefit, which did not entitle Cobb to benefits after Gibbs' death. Because Gibbs could select the Lifetime Benefit without the consent of his wife, there is no pre-existing standing that Cobb had and of which Gibbs' misrepresentation divested her.

Nor was there a duty for Central States to correct Gibbs's misrepresentation about his wife's death once it learned about it in 1981. The plan's terms provide that in case of a misrepresentation, Central States "may" recover any benefit payments that Gibbs was not entitled to receive, not that the Central States "will" or "must" recover such benefits. Also, as explained, Gibbs was entitled to receive the Lifetime Benefit without the consent of his spouse, so Central States had no right to

recover the excess Lifetime Benefit payments from him to keep them in trust for his wife.

Last, there was no duty owed by Central States to Cobb as a "beneficiary" to insure that Gibbs submitted adequate documentation of his marital status. Before 1985 Gibbs had the right to elect the Lifetime Benefit without the consent of his spouse. Therefore, any documentation burden Central States would have imposed, in addition to the application signed under oath by Gibbs, would not have protected Cobb against the harm of which she complains – that Gibbs did not intend her to receive a survivor benefit. Although Congress enacted legislation in 1984 to protect spouses like Cobb of this harm, unfortunately for her, as we have explained, that legislation does not apply retroactively to this case.

In summary, the district court lacked subject matter jurisdiction. The judgment, accordingly, is VACATED, and this matter is REMANDED with instruction to dismiss the complaint for want of jurisdiction.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

DAISY ESTELLE COBB, widow of Oliver Ray Gibbs	CIVIL ACTION
VERSUS	NO. 04-1421
CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION PLAN	SECTION "J"

JUDGMENT

Considering the court's reasons and ruling rendered in open court on July 20, 2005,

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment in favor of defendant, Central States, Southeast and Southwest Areas Pension Plan, and against plaintiff, Daisy Estelle Cobb, widow of Oliver Ray Gibbs, dismissing the plaintiff's suit with prejudice, at plaintiff's cost.

New Orleans, Louisiana, this 20th day of JULY, 2005.

/s/ Carl J. Barbier
UNITED STATES
DISTRICT JUDGE